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THE PROBLEM OF ANTI-TRUST REFORM

For some inscrutable reason the Creator has equipped man with a mind that cannot quite keep up with the times. The course of unintended events hurries our culture towards its unknown future and man belatedly brings up his intellectual resources. He sees with his mind as well as with his eyes, and crowds his observation of things new under the sun into customary categories. To him the emerging corporation is a person; industrial relations concern masters and servants; the work of the machine is manufacture; capitalism is a mere extension of handicraft. It was decades after the old order had felt its shock before the Industrial Revolution was even a name. However strange the new phenomenon may be, man has an old name for it.

Man, the actor-on-the-spot, unlike the leisurely historian a-top of Olympus, must meet events head-on. As a new technology, a novel thing called business, an unusual way of life, a strange trend of thought emerges, the familiar gradually gives way to the unfamiliar. The familiar wears the obvious aspect; the unfamiliar appears but a little revealed,—an implication in an acceptable usage, a potentiality which want and occasion must quicken into life. Change comes by stealth, and its novelties may win a tacit acceptance before their strangeness is noticed; it is not for the men of the times to read between the lines of current happenings and to discover there impending social arrangements. When eventually novelties are too omni-present to be any longer denied, and untoward things seem to be going forward, an alarum is raised over departures from the accepted folk-ways. The people demand that something be done to domesticate the turbulent forces into instruments of order and well-being. To that end there must be a program; the program must be made out of ideas; the only ideas its makers can use are those they possess—and those which belong to common-sense have emerged out of the stress and strain of crises which are gone.

Such a crisis, with its demand for control, appeared in America towards the end of the nineteenth century. The revolution which had gained momentum with the passing of the decades was no longer to be ignored. The increase of scientific knowledge had revealed untold stores

of natural wealth; the march of invention had banished the craft and brought the factory, established the machine-process and quantity production, and erected an industrial order upon mechanical power. The use of credit, accountancy, the corporation, and kindred devices had placed the activities whereby livings are made under the control of business. The extension of the market, the art of salesmanship, and the division of labor had transformed a homogeneous society made up of almost self-sufficient farms and its complement of local trade into an intricate—even if disorderly—articulation of industries. In this development business units came to be of unprecedented size and power. Small manufacturers and traders, who saw their enterprises crowded to the walls, demanded the aid of the government against "big business." The public, who distrusted size as much as they feared extortionate price, raised a hue and cry for "trust busting." It was generally agreed to be high time to "do something about it."

In the emergency the voice of the people found expression in legislation. Accepted ideas were converted into a public policy which was incorporated into the law of the land. The be-all and the end-all of state interference was an enforced competition between rival firms. A long experience of petty trade had demonstrated that the rivalry of seller with seller and buyer with buyer insured efficient service, high quality, and fair price. The interests of a party to trade—seller, lender, or employer—was balanced by the interests of the other party—buyer, borrower, or employee; the desire of the individual was checked by the rivalry of others for the same laborers, investments, or market. The action of "competitive forces," through the operation upon the market of "the law of demand and supply," kept industries organized, eliminated the inefficient, granted survival to the fit, insured to labor satisfactory conditions of work and fair wages, and gave protection to the consumer. Trades were to be kept open—and a self-regulating economy could be depended upon to effect all that the business system should do. The dominant idea was in accord with the legal notion of freedom of contract, the prevailing philosophy of individualism, and the common-sense of the times. So the Sherman Act appeared upon the statute books in 1890; the Clayton and the Federal Trade Commission Acts were added in 1914; and in the years stretching away from the mid-eighties to the nineteen-hundred-and-tens a number of states passed statutes which dubbed understandings among the firms of an industry, "conspiracies," and outlawed combinations "in restraint of trade."

In its translation into law the very purpose of the anti-trust policy was compromised. The ideas of economic theory and of common-sense

had to make their peace with the language of legislation and the process of litigation. The end of "enforced competition" was to be secured by the means of prohibiting such agreements as were technically known to the courts as "conspiracies in restraint of trade." Such concepts were of the law rather than of economics or business; their vitality was to be found in precedents authoritatively set down in the reports of a pre-industrial era. They were to be invoked in suits in criminal law or in equity; conviction of offenders, or decree of dissolution, awaited proof by rules of evidence contrived for getting at the truth in quite alien inquiries; the litigation had to go forward, step by step, under a formal code of procedure never designed to be applied to issues in economic control. The cases were heard before benches of judges, experienced in the discipline of the law rather than business, far better acquainted with Cooley on Blackstone than with Adam Smith and Alfred Marshall, and much more at home with code pleading than with social control. It is hardly strange that questions of fact and of policy were subordinated to the antecedent—and even irrelevant—questions of decorous procedure, and that ingenious attorneys found ways to "wear the cases out" before the real issues were ever raised. The course of the law is unhurried, and its decisions just; it can do more than outlaw specific practices which go beyond legislative tolerance. A business enterprise may use its more nimble ways to employ alternative devices, as yet free from condemnation by the courts, to achieve its acquisitive ends. It is small wonder that the statistics for a period of forty years present a futile picture of law enforcement. A handful of "criminals" sent to prison, a little more than one hundred decrees, and a little less than two million dollars in fines fall far short of what the traffic in "conspiracies in restraint of trade" could bear. On its face the record is a glorious tribute of respect paid by men of business to the very spirit of the anti-trust acts.

But the roots of failure are far more fundamental than the use of the device of litigation to give effect to an economic policy. Modern industrialism has come with startling suddenness; it has been too powerful and too turbulent to be subdued by legislation and court decree; its phenomena have been too unusual to be crowded into familiar formulas of public control. The universe of petty trade was one sort of place; the world of big business is quite another. In the small town the trader could keep one eye on his customers, another on his rivals, and both on his own shop. The custom accorded by his neighbors was a matter of loyalty; desertion to a rival demanded its explanation. Costs were for the most part direct and furnished a basis for price; the quantity of output was easily adjusted to changes in demand. As improve-

ments were gradually made in methods of production, time allowed an easy accommodation. In the great industry eyes alone will not do; a knowledge of the state of the industry, of the future intent of customers, and of the hidden plans of rivals must be the basis of sound policy. The decisions of today may determine the capacity to produce for years to come; yet, in an impersonal market, a demand may suddenly go to a rival, or pass on to another ware. In adapting the capacity-to-produce of an industry to changes in the market, a far neater adjustment is demanded than the separate judgments of competing firms can effect. If they all respond directly to market trends, the whole trade will be undone. In many lines of business overhead costs have become more significant than out-of-pocket expenses; costs are high or low as fixed charges are spread over a small or a large output. The market determines the unit cost of production rather than the unit cost the market. As discovery and invention bring changes in the technical processes of production, the firms in an industry must introduce new methods or be undone. In the great industry an uncontrolled competition must play the rôle of industrial organizer under conditions which were never anticipated.

As a result the operation of competition presents new problems. There is still the chance that rivals may get together and by conspiracy impose unreasonable prices upon their customers. But quite as important is the incidence of an enforced competition in waste and disorder. A series of isolated judgments by the executives of rival businesses does not exorcise plant waste, eliminate surplus capacity, and articulate neat establishments into orderly industries. The tyranny of overhead costs,—which click on with the clock,—and of over-capacity,—which demands to be used,—may lead to an over-done competition which drives prices below the necessary costs of production. In their wake may come a plague of bankruptcies which falls alike upon the inefficient and the efficient. The persons who look to the industry for support may have to accept irregular employment or wages too low to sustain a decent standard of life. Above all, so long as unity in action is restraint of trade, there is little chance to have answered—or even to get raised—the larger questions which affect the conduct of an industry and concern all who have a stake in it. A policy for the industry is formulated—so far as there is any policy—as an incidental by-product of a multitude of isolated judgments about private business affairs.

Hence it is that the anti-trust laws present a challenge. The statutes themselves, the public policy which they embody, and the economic theory they voice need to be considered afresh. In the nineties it was thought that competition could fail only by ceasing to be; that the one

evil to be feared was the toll to be taken of the consumer in monopoly price. Today we know that the institution called competition is a group of arrangements of man's invention; that it works in different industries with quite different degrees of success; and that it holds potentialities alike for order and for disorder. We know that in its actual operation there can be too much, as well as too little, of so good a thing; that it imposes the costs of industrial maladjustment upon investors and managers, upon laborers and consumers alike. We are not yet ready—if ever we shall be—to substitute a ready-made economic system for the prevailing arrangements; most of us would retain the rivalry of firm against firm as an incentive to efficiency. But we have need to rewrite our anti-trust laws to the end that the competition for custom may be carried on within industries which have been subdued to order.

The revision of the statutes presents no easy problem. The demand for change comes from the necessities of an industrial world; the phrases in the acts are remnants from a local society which is gone. Our industries are not alike; banking, railroads, power, and radio-broadcasting have already been accorded their own schemes of control. The technologies of our various trades,—meat packing, building, mining, retailing, and whatnot,—have their own compulsions with which schemes of public control must come to grips. The simple uniformity of the older acts may have to give way to an accommodation of public oversight to the varying necessities of different trades. Most important of all, a conflict of ends must be resolved. If industries are to become orderly, if the office of bankruptcy is to be limited to an elimination of the unfit, if laborers are to enjoy steady employment and living wages, there must be a measure of central direction. The formal control must certainly extend to capacity, probably to output, and possibly to price. If consumers are to be protected, if potential wealth is to become a source of actual plenty, if industries are to be made instruments of national well-being, there must be neither an anti-social restriction of output nor a monopoly element in price. Here is a conflict of values which calls for constructive thought. To revise the statutes in such a way as to serve the interests of investors, managers, and laborers without withdrawing protection from consumers demands a clear vision, full knowledge, and neat adjustment. The anti-trust laws are a declaration that business is affected with a public interest; the moral value of this commitment must not be lost.

The plain truth is that the rewriting of the statutes is the beginning, not the end, of the problem. It may be asserted that no more is intended than to confer a legal sanction upon an exchange of information

or upon an agreement in merely nominal matters among rivals. But behind make-believe and pretense, the significant questions stand out in clear-cut relief. If we are determined to come to grips with the disorder which attends an undirected competition, we must control if not output and price, at least the factors upon which they depend. As our current arrangements go, the formal direction of our businesses lies with the parties who derive from them profits. It is evident that public and legislature are not going to allow them to manipulate output and price to their own pecuniary advantage. If the way of order is to be purposive, an adequate check upon profit-making must be contrived. This may be found either in according to consumers a share in management or in setting up a regulatory commission. Each alternative involves the contrivance of new inventions to serve the ends of social control.

So it is that the revision of the anti-trust laws presents a fundamental challenge. The appearance of accountancy, the corporation, and the machine created a fault-line between the technology of industry and its organization. An economic order in which the productive processes belong to big business, and the arrangements for control to petty trade cannot abide. Out of the ideas of the day a scheme for the orderly direction of the great industry must be devised. We can no longer make the industrial system an instrument of well-being by invoking the ideas which the people of the eighteen-hundred-and-nineties borrowed from a small town culture.

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